

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 91 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

MOHANLAL KHIMJI SONGRA

Versus

STATE OF GUJARAT

Appearance:

MR BD KARIA for Petitioner
MR ND GOHIL, AGP, for Respondent No. 1
None present for respondent No.2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 11/07/2000

ORAL JUDGEMENT

1. This Second Appeal arises out of a judgment and decree passed by Assistant Judge, Rajkot, Camping at Morvi, in Regular Civil Appeal No.27 of 1977 dated August 20, 1982. That appeal arose out of a judgment and decree passed by Civil Judge (S.D.), at Morvi, in Regular Civil

Suit No.128 of 1974 dated March 18, 1977.

2. The facts leading to the present litigation can be narrated thus:-

2.1 The plaintiff (appellant herein) filed a suit against the defendants (respondents herein) seeking the following reliefs:-

"(A) It may be declared that the plaintiff is entitled to draw the basic salary of Rs.345.00 in addition to Rs.111.00 by way of dearness allowance in the scale of Rs.175-8-215-EB-10-255-12-315-EB-15-345 as revised from time to time since 1961 which was made available to Shri B.M. Jadeja.

(B) It may be declared that plaintiff is entitled to claim the post of Asst. Lecturer since 1966 when he was reverted as curator without assigning any reasons.

(C) That the plaintiff is entitled to claim the difference in salary of the post of Asstt. Lecturer which he held for a period of six years thus he is entitled to claim the difference in salary between the two post of curator and Asst. Lecturers. A declaration be therefore given as stated above.

(D) A permanent injunction be issued against the defendant state directing them to quash the order of appointment of Shri H.D. Daftary as also directing the defendant State to pay to him all the differences in salary, promotion and seniority as claimed above and to direct the defendant State to promote the plaintiff as Assistant Lecturer alternatively he stands promoted as Assistant Lecturer since 1966."

2.2 The case of the plaintiff is that he is denied equal pay for equal work as compared to one Mr. B.M. Jadeja working on the same post (Curator) in the Engineering College, at Rajkot, which is also a grantable college same as the college in which the plaintiff is

working as Curator. He, therefore, filed a suit seeking above mentioned reliefs. Another fold of contention was that he has been discriminated as against one Mr. H.D. Daftari, defendant No.2, while giving promotion to the post of Demonstrator and, consequently, Assistant Lecturer. According to the plaintiff, he is senior to defendant No.2, both in length of service and in qualifications.

2.3 The case of the defendants is that defendant No.2 is better qualified than the plaintiff and the plaintiff cannot be considered as senior to defendant No.2. So far as case of the plaintiff against Mr. B.M. Jadeja is concerned, the defendants' case is that the two institutions are different which were established in the erstwhile Saurashtra state and, therefore, the plaintiff cannot claim equal pay for equal work.

2.4 The Trial Court, after considering the evidence led by rival sides, dismissed the suit holding that the evidence indicated that defendant No.2 is better qualified than the plaintiff and that defendant No.2 cannot be considered as junior to the plaintiff. The Trial Court also held that there is no evidence to indicate that the nature of work that the plaintiff was doing was similar to the work of Mr. B.M. Jadeja, in respect of whom the plaintiff claims equal pay for equal work.

2.5 Aggrieved by the dismissal of the suit, the plaintiff approached the District Court. The learned Assistant Judge, Camping at Morvi, after hearing both the sides, dismissed the appeal.

2.6 Aggrieved by the said dismissal, the plaintiff has approached this Court with this Second Appeal. This Court, while admitting the appeal, has framed following substantial questions of law, which need to be considered:-

"(1) Whether in the facts and circumstances of the case, the courts committed substantial error of law in omitting to read and/or misreading the evidence, in as much as the plaintiff, who is senior to the defendant No.2, both in respect to length of service and educational qualification, was caused grave injustice in appointment as demonstrator and subsequent promotion in higher post and

thereby causing discrimination under Article 14 of the Constitution of India.

(2) Whether in the facts and circumstances of the case, the courts committed error of law in appreciating that the plaintiff, though fully qualified and competent for the post of Assistant Lecturer, was not appointed or promoted as such in 1960 and the defendant No.2 though non-matric was given preference to the plaintiff on the said post illegally and arbitrarily."

3. Mr. Karia, learned advocate appearing for the appellant, has put in full efforts to substantiate the case of the plaintiff-appellant. He submitted that injustice is caused to the appellant-plaintiff right from the beginning. The appellant was appointed as Radio Mechanic in 1950 and was selected and promoted as Curator in 1954. Defendant No.2 was appointed as Demonstrator in Radio Communication Department in 1954. Mr. Karia, therefore, submitted that, at that point of time, the appellant ought to have been posted as Demonstrator as against defendant No.2 and this injustice caused to the appellant has resulted into a cumulative jeopardy, which has expanded geometrically, if the loss is considered in terms of rupees. According to Mr. Karia, the loss goes on multiplying because it has a direct effect on the post-retiral benefits, including pension. Mr. Karia submitted that in 1960, again injustice meted out to the appellant when he was not considered for the post of Assistant Lecturer. The appellant was working as an Assistant Lecturer, but was not given pay scale of Assistant Lecturer and, therefore, while giving promotions on both the occasions, injustice is meted out to the appellant. Mr. Karia submitted that both the Courts below have not considered the case of the appellant in its right perspective in light of the evidence produced on record. Mr. Karia submitted that respondent No.2 was not properly qualified. Still, he was given promotion and, if the observations made by the Trial Court, in this regard, are seen, it is evident that erasures were made in the Service Book of respondent No.2 to the effect that his qualifications were shown to be matriculate, which has later been changed to non-matriculate. This would indicate that when promotion was given, qualification of matriculate was considered, whereas, in fact, he was not a matriculate at all. The Trial Court has not considered this aspect and has tried to brush aside this argument by stating that erasures by

themselves do not indicate anything and erasers are also seen in the Service Book of of the plaintiff-appellant. Mr. Karia submitted that this was an error on part of the Trial Court. Mr. Karia submitted, lastly, that in 1980, the appellant was appointed as Assistant Workshop Superintendent (Electrical) in the pay scale of Assistant Lecturer and, therefore, he was eligible for becoming Assistant Lecturer, which was not considered by the First Appellate Court. If it was rightly considered by the First Appellate Court, the appellant ought to have been given promotion in the year 1960. Mr. Karia submitted that the appeal, therefore, deserves to be allowed.

3.1 Mr. Karia urged that one more substantial question of law need to be framed while deciding this appeal. According to Mr. Karia, the question could be thus framed :-

"Whether the Courts below committed an error in not properly appreciating the case of the appellant for equal pay for equal work vis-a-vis Mr. B.M. Jadeja since 1960?"

Mr. Karia submitted that although this question has not been suggested in the appeal memo and not been framed by this Court while admitting the appeal, this may be framed and considered by this Court in the interest of justice. He has relied upon number of decisions of the Apex Court and has drawn attention of this Court to proviso to Section 100 of the Code of Civil Procedure. He submitted that the finding of both the Courts below on this question is grossly erroneous as no oral evidence is required to be led for the purpose of establishing this case and, therefore, this question may be framed.

4. Mr. Gohil, learned Assistant Government Pleader appearing for respondent No.1, has opposed this petition. None appears for respondent No.2.

4.1 According to Mr. Gohil, this appeal is not maintainable in law. He submitted that the substantial questions of law framed by this Court are more or less in the nature of finding of fact. There is concurrent findings of fact so far as the questions framed by this Court are concerned. Mr. Gohil submitted that the appellant has approached this Court at a highly belated stage. Assuming that injustice was meted out to the appellant-plaintiff in 1954, he has approached the Court, for the first time, in 1974 by filing the suit, that is nearly after 20 years.

4.2 So far as the case for equal pay for equal work is concerned, Mr. Gohil submitted that no question in this regard is framed while admitting the appeal. He submitted that such a question may not be framed at this belated stage. He, however, submitted that there is no embargo on framing of such question, at this stage. But, if such question is framed at this stage, it would lead into a further extended litigation.

4.3 Mr. Gohil submitted that so far as the case of the appellant against respondent No.2 is concerned, the Courts below have properly considered the evidence. The post of Curator is a non-teaching post, whereas the posts of Demonstrator and Assistant Lecturer are teaching posts and, therefore, they cannot be intermingled or considered as equivalent to each other. He submitted further that promotion is never a matter of right and further going from one cadre to another cadre is by selection and, therefore, the appellant could not have claimed a right of promotion. It is more or less a matter of selection. Mr. Gohil submitted further that, so far as the case of the appellant for equal pay for equal work qua Mr. B.M. Jadeja is concerned, as has rightly been observed by the Courts below, there is no evidence to indicate that the nature of the work done by the appellant and Mr. Jadeja was same or even similar and, therefore, there is no substance in the appeal and the appeal may be dismissed.

5. Having regard to contentions raised by the learned advocates for the parties, in light of the questions formulated by this Court while admitting this appeal, the Court is required to consider whether the plaintiff was illegally and arbitrarily denied promotion to the post of Demonstrator and consequent promotions in spite of he being senior to defendant No.2, both in terms of length of service and educational qualifications.

5.1 For considering this question in this Second Appeal, the Court has examined the record and proceedings of the Trial Court. It is found that undisputedly promotion to the post of Demonstrator was denied, for the first time, to the appellant in 1954, as against defendant No.2-Mr. Daftari. The appellant, on that occasion, was recommended for the post of Curator. The appellant has, for the first time, agitated this denial by filing suit in 1974, i.e. after a lapse of 20 years. This delay in itself is sufficient to turn down the case of the appellant. However, even on merits, it may be noted that the appointment to the post of Demonstrator was given to defendant after holding open interviews by a Selection Committee. There is a clear finding of fact

rendered by the Trial Court and upheld by the Lower Appellate Court that the plaintiff was not in any way senior to defendant No.2 either on account of length of service or in qualifications. It is also to be noted that the cadre in which the appellant was working and the cadre in which defendant No.2 was working were not the same. One post belonged to teaching cadre and the other belonged to a non-teaching cadre. These aspects have been considered by both the Courts below. Under the circumstances, there appears no reason for this Court to interfere with the finding of the Courts below. Question No.1 formulated by this Court while admitting the appeal is, therefore, answered in the negative.

6. Coming to the second question, the appellant asserts that, though fully qualified for being posted as Assistant Lecturer, he was not given promotion to that cadre, as against Mr. Daftari, defendant No.2. It is also a contention that defendant No.2 was, in fact, not qualified but people interested in him manipulated the Service Book of defendant No.2 to do him a favour. These allegations of mala fides and mala fide action are not supported by any evidence oral or otherwise. An argument was advanced on behalf of the appellant that the Courts below have found that there were erasers in the Service Book of Mr. Daftari regarding his qualifications. The erasers were to the effect that, firstly, he was shown as matriculate and then a non-matric. It was urged, therefore, that qualification of being matriculate was shown to afford promotion to defendant No.2 and after giving promotion, the same has been rectified. It is not possible to accept this argument for the reason that there is no evidence to indicate as to when these erasers or rectifications were made. There is no evidence to indicate that these rectifications were made with ulterior motive of affording illegitimate promotion to defendant No.2 and, in absence of any material, the contention raised cannot be accepted.

6.1 So far as promotion to the post of Assistant Lecturer is concerned, the contention is two fold - (1) that the appellant was promoted as Assistant Lecturer in 1962 and in spite of his satisfactory work record, he was suddenly reverted to the post of Curator and one Mr. Vasavada was appointed. In this regard, there is clear finding of fact by the Courts below that the plaintiff-appellant was never posted as Assistant Lecturer. He was only ordered to hold charge of Assistant Lecturer till a new man is appointed to that post. As such, the case of the plaintiff-appellant, therefore, cannot be said to be well founded for

promotion to the post of Assistant Lecturer. Another fold of argument that was advanced by Mr. Karia is that, though the plaintiff-appellant worked as Assistant Lecturer, he was not given pay scale of an Assistant Lecturer, but was only given charge allowance. This argument also cannot be accepted for the reasons stated above, namely, that the plaintiff-appellant was never posted as Assistant Lecturer, he was directed to hold charge and, therefore, there is no question of placing him in the pay scale of Assistant Lecturer. Here also, the action taken by the appellant-plaintiff is belated. Admittedly, he worked as Assistant Lecturer between 1962 and 1996, if at all he was reverted, as is asserted by the plaintiff, he ought to have asserted his right immediately and not in 1974 when he filed the suit nearly after eight years. The second question, therefore also, is answered in the negative.

7. Mr. Karia submitted that the Courts below have mainly dealt with the case of the plaintiff-appellant for promotion, but the case of the plaintiff regarding equal pay for equal work in comparison to Mr. Jadeja working as Curator in the Engineering college, at Rajkot, is not given due weightage. In this regard, it may be noted that an issue was framed by the Trial Court, which has been dealt with by the Trial Court, the evidence led by the parties has been considered and, thereafter, the issue is answered in the negative. It, therefore, cannot be said that the Courts below have not considered the case of the plaintiff in this regard. Mr. Karia submitted further that, although the question has not been framed by this Court while admitting the appeal, this Court may frame that question even at this stage, as lit is likely to affect the right of the plaintiff-appellant substantially. The other side was also heard on this question.

7.1 There cannot be any doubt that, if the Court deems it necessary so to do, it may frame an additional question at any stage, if it is found that such a question is involved. But whether there are sufficient reasons to do so will have to be examined. In this regard, it may be noted that while going through the record, this Court found no material to indicate that nature of work of the plaintiff-appellant and that of Mr. Jadeja working in the Engineering College, at Rajkot, as Curator is identical or substantially similar. There is no material either to indicate that cadre of both Mr. Jadeja and the appellant-plaintiff was the same. Mr. Karia also could not point out any material to indicate the above aspects. Therefore, without entering into the

question as to the question is required to be formulated at this stage, it is found by this Court that the contention does not merit acceptance.

7.2 Apart from the above aspect, another material factor that cannot be overlooked is that even the appellant has not agitated this question in the memo of appeal and, if the appellant has not agitated this question in the memo of appeal, accepting the verdict of the Courts below, there is no question of formulating such a question and re-deciding the same. The request, therefore, for formulating the question suggested by Mr. Karia cannot be accepted.

8. Last but not least, Mr. Karia contented that the appellant was appointed as Assistant Workshop Superintendent (Electrical) in the pay scale of Assistant Lecturer. He was, therefore, eligible to become Assistant Lecturer, which post has been denied to the appellant. This has not been considered by the Lower Appellate Court.

8.1 This contention also cannot be accepted for the reason that suit was decided in 1977. No such contention could have been there. The new development would give a fresh cause of action, if any, and it cannot be considered in an appeal where the question is not in issue.

8.2 Apart from this, the contention cannot form ground to support the case of the appellant for the reason that there is no material to indicate that pay scale of Assistant Lecturer and Assistant Workshop Superintendent (Electrical) are same. It would be another question whether in event of such material being shown, both the posts can be treated as of same cadre or similar and interchangeable. But such questions are not available to be raised, agitated and decided in a Second Appeal under Section 100 of the Code of Civil Procedure, as the scope of second appeal is well defined.

9. For the foregoing reasons, this Court finds no merit in this appeal and the appeal is, therefore, dismissed. No costs.

[A.L. DAVE, J.]

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